IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.08.2009

CORAM

THE HONOURABLE MR.JUSTICE K.CHANDRU

APPLICATION NO.532 OF 2004 AND O.A.NO.371 OF 2008
IN
O.P.NO.159 OF 2000 AND C.S.NO.335 OF 2008

1.K.Veeramani
2.K.Selvamani .. Applicants in
both applications

Vs.

Rani .. Respondent in
A.No.532 of 2004
2nd respondent in
OA No.371 of 2008

G.Kapali .. 1st respondent in
OA No.371 of 2008

A.No.532 of 2004 is filed seeking to revoke the letters of administration granted in O.P.No.159 of 2000, dated 2.7.2001.

O.A.No.371 of 2008 is filed seeking to grant an order of ad interim injunction restraining the respondents from interfering with the petitioners' peaceful possession and enjoyment of the property mentioned in the application.

For Applicant : Mr.K.Venkatakrishnan

For Respondent : Mr.S.Balasubramanian

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ORDER

The application in A.No.532 of 2004 seeks to revoke the Letters of Administration granted in O.P.No.159 of 2000, dated 2.7.2001.
2.O.P.No.159 of 2000 was filed by the respondent, seeking for grant of Letters of Administration in the matter of last Will executed by Smt.Andal Ammal. The respondent claimed that she is the beneficiary of the said Will. The said Andal Ammal died on 10.8.1995 leaving behind the respondent, who is her daughter born through the first husband Late Natesa Naicker. In that OP, she had made the present applicants as respondents. Notice was ordered to the first applicant, which came back

with and endorsement refused. Therefore, it was affixed. With reference to the second applicant, notice came back with an endorsement that he had gone out. Thereafter, on 11.3.2001, paper publication was ordered on two newspapers, i.e. News Today and Malai Murasu. A proof was filed on 2.4.2001. Thereafter, on 11.4.2001,the matter was directed to be posted before the Master for recording evidence. Ultimately, the respondent gave her evidence on 19.6.2001 and Exs.P.1 to P.5 were marked.

3.In that evidence, she has admitted that applicants 1 and 2 were born to her mother through Kuppusamy, who was her uncle. In fact, he father Natesa Naicker predeceased Andal Ammal. Thereafter, her mother was taken care of by her uncle Kuppusamy. On the basis of these averments, by an order, dated 2.7.2001, this Court granted Letters of Administration. It was thereafter, the present application was taken up by the applicants.
4.It was stated by the applicants that they were not served with any notice in the OP and the letters of administration was obtained without notice to them. They came to know about the proceedings only when an Ejectment Suit was filed in Ejectment Suit No.16/2002 by the respondent. Thereafter, by a letter, dated 24.11.2002, the applicants asked respondent to furnish a copy of the petition together with a copy of the alleged will. Since they did not get any reply and one of the applicant was set ex-parte, which was subsequently set aside, they came forward with the present applicastion.
5.It was admitted that their father Kuppusamy in order to encourage widow remarriage, married the said Andal Ammal. Andal Ammal and the first wife of Kuppusamy, Saradambal, were sisters. It was also stated that the respondent's mother was only an house wife and never had any independent income and it was the income of their father Kuppusamy, who earned it by running a laundry business. It was also stated that the applicants and their mother filed a suit against the first wife and her children before the City Civil Court in O.S.No.5336 of 1980. It was also stated that the respondent's mother Andal Ammal had no right to execute a Will over the schedule mentioned properties. They were not aware of any Will left by her mother. It was also stated that the applicants are living in the suit property in their individual capacity. The will was not properly attested and it was a forged will. The Letters of Administration was obtained under misrepresentation and fraudulent means.
6.Notice was ordered on this application. The respondent was directed to file a counter. The respondent/original petitioner has filed a counter affidavit, dated 23.7.2009. In that counter affidavit, it was stated that the applicants though were served with notice in the OP, have evaded service and they are unnecessarily accusing the respondent. Even though letters of administration was granted as early as 2001, the present application came to be filed only after considerable delay. The Will was properly proved before this court. In order to avoid an adverse order in the ejectment suit, they have come up with the present plea.
7.In the meanwhile, the applicants have also filed a suit before this Court in C.S.No.335 of 2008 with prayer that settlement deed, dated 4.3.2005 executed by the second defendant, namely the original petitioner Rani, in favour of her husband, settling the suit schedule property, was null and void and for a consequential injunction restraining the respondents from enjoying the property.
8.Pending the suit, an application in O.A.No.371 of 2008 was also taken out for the grant of an ad interim injunction.
9.The question that arises for consideration in the present case is whether the applicants were served with any notice in the OP proceedings, before ordering substitute of service? and whether they are entitled for an ad interim injunction pending suit.
10.Original notice papers were summoned from the Registry. It is seen that notice in respect of the first applicant was affixed on 27.7.2000 on the outer door of his residence at No.10, III Main Road, CIT Nagar, Madras-35 as he could not be found during the bailiff's visits on 21/6, 24/6, 27/6, 10/7 and 27/7, 21/8, 13/10, 19/10, 7/11 and 16/11/2000 and it was reported that he had gone out. Likewise regarding the second applicant, the bailiff's endorsement is that since he had gone out, he

could not be served and therefore, it was affixed on the outer door. Only on the basis of these affixtures, dated 27.7.2000, 24.8.2000 and 16.11.2000, notices were served on the respondents.
11.It is the case of the applicants that they were never informed about the original proceedings. Order 41 of the Madras High Court Original Side Rules provides the manner of service of notice on the parties. Order 41 Rule 2 clearly stipulates that if on the registered address, parties are not present, the notice will be affixed at the outer door of the house and such service shall unless the court at any stage otherwise orders will deem to be a due service of summons of the petition. Order 41 Rule 3 clearly stipulates that unless it is otherwise provided, all notices shall be left at the address of the parties.
12.In the present case, apart from several attempts to serve the notices by the bailiff, notices were affixed on the Court Notice Board (CNB) and a substituted service (SS) on the Last Known Residential Address (LKR). Further, publications were also made in newspapers. Therefore, it has to be taken as effective service of notices on the applicants.
13.The learned counsel for the respondent also contended that one of the two applicants is very much employed within the court campus and therefore, his pleading ignorance cannot be believed. Be that as it may that after having served notices in accordance with the rules, the applicants have deliberately chosen not to enter appearance and allowed the proceedings to become final. It is not open to them to challenge the same after a period of three years on the alleged ground that they came to know of the proceedings only when an ejectment suit was filed. Even in the application filed in support of the application, they have not disclosed sufficient caveat interest to interfere with the Letters of Administration granted on 2.7.2001. There was no misrepresentation with reference to the grant of Letters of Administration. The allegation that it was a forged will is very vague.
14.The respondent/original petitioner was the daughter of Andal Ammal, who married Natesa Naicker and she is a direct legal heir of the deceased Andal Ammal, whereas the applicants were the sons of the second husband Kuppusamy. Therefore, they cannot be called as a direct descendants of Andal Ammal. They cannot dispute the title of Andal Ammal in these proceedings as in a proceedings for Letters of Administration, no one can question the title of the testatrix.
15.The Supreme Court in Basanti Devi v. Ravi Prakash Ram Prasad Jaiswal reported in (2008) 1 SCC 267 has observed in paragraphs 21 to 23 as follows:
21. Reliance has been placed by Mr Bhatt on a decision of this Court in Ishwardeo Narain Singh v. Kamta Devi1 wherein, inter alia, it was held: (AIR p.281, para 2)
2. The Court of Probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court.
22. The Probate Court, indisputably, exercises a limited jurisdiction. It is not concerned with the question of title. But if the probate has been granted subject to compliance with the provisions of the Act, an application for revocation would also lie.
23. In Chiranjilal Shrilal Goenka v. Jasjit Singh whereupon again Mr Bhatt relied upon, this Court held: (SCC pp.519-20, para 20)
20. On a conspectus of the above legal scenario we conclude that the Probate Court has been conferred with exclusive jurisdiction to grant probate of the will of the deceased annexed to the petition (suit); on grant or refusal thereof, it has to preserve the original will produced before it. The grant of probate is final subject to appeal, if any, or revocation if made in terms of the provisions of the Succession Act. It is a judgment in rem and conclusive and binds not only the parties but also the entire world. The award deprives the parties of statutory right of appeal provided under Section 299. Thus the necessary conclusion is that the Probate Court alone has exclusive jurisdiction and the civil court on original side or the arbitrator does not get jurisdiction, even if consented to by the parties, to adjudicate upon the proof or validity of the will propounded by the executrix, the applicant. It is already seen that the executrix was nominated expressly in the will and is a legal representative

entitled to represent the estate of the deceased but the heirs cannot get any probate before the Probate Court. They are entitled only to resist the claim of the executrix of the execution and genuineness of the will. The grant of probate gives the executrix the right to represent the estate of the deceased, the subject-matter in other proceedings. We make it clear that our exposition of law is only for the purpose of finding the jurisdiction of the arbitrator and not an expression of opinion on merits in the probate suit.

16.The same view was reiterated in Krishna Kumar Birla v. Rajendra Singh Lodha reported in (2008) 4 SCC 300, wherein the Supreme Court has held that any person claiming any interest adverse to the testatrix interest cannot maintain any application before the Probate court.

17.Further in Basanti Devi's case (cited supra), the supreme Court held that once the next kin to the testator were made parties and publications effected in a manner known to law, they cannot question the issuance of grant of Probate by bringing an action under Section 263 of the Indian Succession Act. In paragraphs 18 and 24, it was observed as follows:

18.The provisions contained in sub-section (3) of Section 283 are mandatory in nature. Once the statutory requirements are found to have not been complied with, an application for revocation of the grant of probate would be maintainable in terms of Section 263 of the Act, apart from the fact that non-publication of citation could be one of the grounds to revoke the grant of probate....

24.It is now well settled that an application for grant of probate is a proceeding in rem. A probate when granted not only binds all the parties before the court but also binds all other persons in all proceedings arising out of the will or claims under or connected therewith. Being a judgment in rem, a person, who is aggrieved thereby and having had no knowledge about the proceedings and proper citations having not been made, is entitled to file an application for revocation of probate on such grounds as may be available to him. We are, therefore, of the opinion that the application for revocation of the grant of probate should have been entertained.

18.In the light of the same, the application deserves to be dismissed. Accordingly, A.No.532 of 2004 in O.P.No.159 of 2000 stands dismissed. No costs.

19.In O.A.No.371 of 2008, the very same applicants have filed a suit in C.S.No.335 of 2008 against the respondent, seeking for a declaration that the settlement deed, dated 4.3.2005 registered as document No.539 of 2005 by the second defendant in favour of her husband was null and void and for a permanent injunction restraining the respondent/defendants from interfering with the peaceful possession and enjoyment of the property. In the schedule to the suit property, the same property is set out, for which the second defendant got a Letters of Administration in O.P.No.159 of 2000.

20.Pending the suit, an application is filed for the very same prayer for an interim injunction. In that application, only notice was ordered on 28.3.2008. On notice from the court, the respondent has filed a counter affidavit, dated 23.7.2009. In that counter affidavit, it was clearly stated that they had obtained a Letters of Administration in respect of the property and therefore, such an injunction cannot be granted. An ejectment suit was filed by the respondent and it is pending consideration by the City Civil Court against the applicants. As this Court has held that the Letters of Administration obtained by the respondent in respect of the property is valid, this injunction application cannot be entertained. Accordingly, this O.A.NO.371 OF 2008 in C.S.No.335 of 2008 stands dismissed. No costs.

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